UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

LOSHAW THERMAL TECHNOLOGY, LLC

Case: 5-CA-158650

and

INTERNATIONALASSOCIATION OF HEAT AND FROST INSULATORS AND ASBESTOS WORKERS, LOCAL UNION NO. 23

BRIEF OF RESPONDENT TO
ADMINISTRATIVE LAW JUDGE ERIC M. FINE

COMES NOW counsel for Respondent, Loshaw Thermal Technology, LLC (referred to herein as "Loshaw" or "Respondent") in accordance with the instructions set forth by the Administrative Law Judge at the close of the hearing on April 25, 2016, as modified by the Order issued on May 24, 2016, and hereby files this Brief to Administrative Law Judge Eric M. Fine, and in support thereof, avers as follows:

I. STATEMENT OF THE CASE

The initial Complaint and Notice of Hearing against Respondents was filed on December 31, 2015, and an Answer thereto was filed on January 13, 2016. The Answer filed admitted the jurisdictional and certain other allegations, but denied the commission of any unfair labor practices.

A hearing was held before the Administrative Law Judge on April 25, 2016.

II. ISSUES

1. Was the relationship between Respondent and the Union an 8(f) relationship at its inception?

   Suggested Answer: Yes

2. Was the bargaining relationship between Respondent and the Union ever converted to a 9(a) relationship?

   Suggested Answer: No.

3. Should the Board continue to adhere to the rule adopted in Levitz Furniture Co. of the Pacific, 333 NLRB 717 (2001) that an Employer must prove that a Union actually lost majority status to support a withdrawal of recognition.

   Suggested Answer: No.

4. If the Board should decide to abandon the Levitz rule, what should replace it?

   Suggested Answer: Contrary to the position being asserted by the General Counsel that a withdrawal of recognition can only be supported by the results of an RM or RD election, Respondent urges the Board to return to the longstanding Celanese rule that an Employer only needed to have a good faith doubt as to the Union's majority status.

5. Assuming the Levitz rule applies, was there objective evidence that the Union actually lost majority status?

   Suggested Answer: Yes.

III. STATEMENT OF FACTS

All of the facts of this case were either stipulated or are uncontested. At the opening of the hearing, the parties introduced Joint Exhibit 1 which included 37 Stipulations and incorporated eight exhibits. The Stipulations set forth the nature of Respondent's business, its ownership structure and the complete employment history for all individuals employed by the company since it was established in 2011. The only witness to testify was Michael Bittner whose testimony is therefore uncontested. Respondent is a construction industry employer who began providing

thermal mechanical insulation services in 2011. Respondent is a closely held limited liability company whose co-owners are Marci Bittner and Wendy Bittner who each own 50% of the business. Wendy Bittner's husband, Logan Bittner, has been employed by Respondent from August 2011 to the present. Marci Bittner's husband, Shawn Bittner, has also been employed by Respondent from August 2011 to the present. (Joint Ex. 1)

At the time Respondent signed the 2011 – 2012 collective bargaining agreement with the International Association Of Heat And Frost Insulators And Asbestos Workers, Local Union No. 23 (hereinafter referred to as the "Union"), only Logan Bittner and Shawn Bittner were performing bargaining unit work as described in that agreement. Michael Bittner, the brother of Logan and Shawn and brother-in-law of Marci and Wendy Bittner, has been employed by Respondent from April 2012 to the present. As noted previously, Michael Bittner was the only witness to testify at this proceeding. Michael Bittner had been a member of the union many years before, but left the union sometime in the early 2000's because "he didn't want to be a part of it." (p. 23-e,. 7)[1] he testified that while he was at the Loshaw office before he began working 2012, he was present during the meeting that former Union Business Manager Stanton Bair had with Wendy and Marci Bittner during which they are said that Loshaw could hire anyone they wanted to. Around that same time, Michael Bittner rejoined the union so he could go to work for his sisters-in-law. (p. 26)

Michael Bittner further testified that he had conversations with his brothers, Logan and Shawn, during the" whole time" between 2012 and 2015 during which he made it clear he didn't want to be in the union anymore. (pp. 27-28) Michael Bittner further testified that sometime in the spring of 2015, approximately 60 days or so before the expiration of the contract, he stopped by the office as he usually did a day to pick up his paycheck and he was advised that the company was

1 References to page numbers refer to the Official Transcript of the Hearing.

leaving the union and that it was up to him to stay with them or go with the union. (pp. 29 – 31) Michael Bittner made it clear in his testimony that the only reason he rejoined the union was so that he could work for his sisters-in-law and that had made it consistently clear to Shawn and Logan that he did not want to be part of the union. He further testified that his opinion on this critical issue had never changed. (p. 32) Michael Bittner testified that sometime shortly before the expiration of the contract, he submitted a resignation letter to the union and acknowledged that "the ladies in the office" typed it up for him since his computer was broken.

The only non--family member employed by Respondent since at least January 2014 was Joseph DeLozier who was employed by Respondent from about April 2012 to April 28, 2015. (Joint Ex. 1, ¶19) Although paragraph 29 of the Stipulation (Joint Ex. 1) states that Respondent's April 24, 2015 letter to the union indicated its intent "to terminate the parties bargaining relationship" upon the expiration of the 2012 – 2015 collective bargaining agreement, the letter which is attachment 7 to the Stipulation simply states that Respondents were terminating the agreement effective June 28, 2015. Nevertheless, Respondent admits that as of the time of the conversations with Michael Bittner discussed above, they were prepared to terminate the relationship upon the expiration of the agreement.

As noted, DeLozier was no longer employed by Respondent after April 28, 2015 and no one else was hired to perform bargaining work until Adam Geesey was hired in September 2015. Geesey is the son of co-owner Marci Bittner. (Joint Ex. 1 pp. 22, 25)

IV. ARGUMENT

A. Overview

This case presents an unusual juxtaposition of facts that make it surprising that this small

employer has to defend itself against the full weight of the United States government. Loshaw is the epitome of a small family business since for most of its time in operation, the only persons performing bargaining unit work have been the husbands', son and brother-in-law of the owners of the company. As will be discussed in more detail below, it is clear that despite the language of the collective bargaining agreement, the relationship between respondent and the union at its outset was governed by section 8 (f) of the National Labor Relations Act and there is no evidence that it was ever converted into a 9 (a) relationship. It is also clear that based on their close family relationship and his repeated statements, Respondent knew that Michael Bittner did not want to be represented by the union and that this constituted objective evidence that the union had, in fact, lost majority status (if they ever had it.)

B. The Bargaining Relationship Between the Parties is Governed by Section 8 (f) of the NLRA

In many ways, this case illustrates all of the problems inherent with the Board's current approach to the nature of the 8(f) relationship between the employer and a union in the construction industry, and the potential conversion of that relationship from an 8(f) relationship to a 9(a) relationship. Since the Board's decision in John Deklewa & Sons, 282 NLRB 1375 (1987), enfd. 288 43 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988), the Board and the Courts have grappled with the appropriate standards to apply to determine whether a relationship between a construction industry employer and a union is governed by Section 8(f) or Section 9(a) of the National Labor Relations Act. Deklewa, of course, established the principle that there is a rebuttable presumption that a construction industry bargaining relationship is an 8(f) relationship. (Id. at 1385, n. 41)

In Central Illinois Construction, 335 NLRB 717 (2001), the Board held that a party asserting a Section 9(a) relationship may rely upon appropriate contract language alone to establish it. In Central Illinois, the Board adopted the Tenth Circuit's three-part test (NLRB v. CCC Maintenance, Inc., 219 F.3d 1147, 1155 (10th Cir. 2000), which provided that a 9(a) status is established with contract language that unequivocally indicates:

1. That the union requested recognition as the majority or 9(a) representative of the unit employees,

2. That the employer recognize the union as the majority or 9(a) bargaining representative, and

3. That the employer's recognition was based on the union having shown, or having offered to show, that it had the support of a majority of unit employees. (Central Illinois at 719-720)

This reliance upon contract language alone has not always met with favor in courts. See, for example, Nova Plumbing, Inc. v. NLRB, 330 F.3d 531, 536-538 (D.C. Cir. 2003), denying enf. of 336 NLRB 633 (2001). Similarly, in a line of cases involving Goodless Electric, which spanned the years from 1996 to 2002, the First Circuit repeatedly reversed the Board's finding of a 9(a) relationship based upon contract language. (See NLRB v. Goodless, 124 F.3d 322 (1st Cir. 1997) and NLRB v. Goodless, 285 F.3d 102 (1st Cir. 2002)

The facts of this case demonstrate clearly the problem with relying solely upon the language in a document. Here, Respondent concedes that the language of the 2009-2012 Agreement would appear to meet the three-part Central Illinois test, but the Stipulation clearly reveals that the language of the agreement was false. At the time that Respondent signed this Agreement, the only individuals performing bargaining unit work were Logan and Shawn Bittner, who have been stipulated to be supervisors as determined by Section 2(11) of the Act and the husbands of Wendy Bittner and Marci Bittner respectively, who are each 50% owners of Loshaw.

Both Court and Board precedent make it clear that because of this family relationship, neither meet the NLRA definition of employee. See NLRB v. Action Automotive, 469 U.S. 490 (1985) and Cerni Motor Sales, Inc. 201 NLRB 918 (1973). Clearly, then, the Union could not, in fact, have shown that it represented a majority of bargaining unit employees when the initial agreement was signed in 2012.

C. The Relationship Was Never Converted to 9(a)

Counsel for the General Counsel will presumably argue that regardless of the nature of the bargaining relationship between Loshaw and the Union in 2011, it was subsequently converted to a 9(a) relationship by the execution of the 2012-2015 CBA, since Michael Bittner and Joseph Delozier were also employed when that agreement was signed (¶17 of Stipulation.) Michael Bittner's testimony makes it clear, however, that he was never a willing member of the Union. In Deklewa, the Board noted that it is well established that union membership is not always an accurate barometer of union support. (282 NLRB at 1375) Furthermore, in Central Illinois, the Board cautioned that the use of employee union membership is insufficient to establish majority status. (335 NLRB at 720) The facts of this case dramatically underscore the reason to exercise such caution.

Once a construction industry employer signs an 8(f) agreement, under Deklewa, it is obligated to honor that agreement for its terms. Depending upon the specific terms of the agreement, this would include requiring union membership after seven days of employment, and paying into the union fringe benefit funds. To allow a union to boot strap into a 9(a) relationship solely by virtue of a construction industry employer's compliance with the terms of an 8(f) agreement is contrary to logic and should be contrary to the law. Here neither the General Counsel nor the Union offered any testimony regarding the Union membership or sympathies of

DeLozier or any of the employees identified in Paragraph 21 of the Stipulation. It is clear from Michael Bittner's testimony that he was a reluctant union member only because of the contractual requirement.

More recently, in King's Fire Protection, 362 NLRB N0. 129 (2015), the Board reaffirmed its adherence to Central Illinois over the strong dissent of Member Miscimarra. Clearly Respondent believes that Member Miscimarra's analysis of the continued reliance on Central Illinois is more persuasive and should be adopted by the Administrative Law Judge (see sl. op. at pp3-8) His discussion of Nova Plumbing and subsequent DC Circuit Court cases is especially enlightening. It is respectfully urged that the Board should return to a rule similar to that set forth in Golden West, 307 NLRB 1494 (1992), which required extrinsic evidence of a contemporaneous showing of majority support to convert the relationship, as opposed to simple language in contracts. With respect to any potential 10(b) argument, Respondent urges the Administrative Law Judge to review and adopt Member Miscimarra's well-reasoned analysis of this issue as well in King's Fire Protection. *Ibid.*

D. Should the Board Continue to adhere to the Levitz Standard for Withdrawal of Recognition

As the Administrative Law Judge is aware, the due date for briefs was extended in light of the General Counsels announced intent to urge the abandonment of the Levitz standard that the employer could withdraw recognition from an incumbent union only if it was established that the union had, in fact, lost majority status. Levitz, which was decided in 2001, itself reflected an abandonment of the Celanese rule which had been in effect since 1951 and had been endorsed by the Supreme Court in Allentown Mack Sales & Service, Inc. v. NLRB (1998) 522 U.S. 359. The Celanese standard permitted an employer to withdraw recognition if it had a good faith doubt

regarding the union's majority status. On May 9, 2016 General Counsel Richard Griffin Jr. issued GC Memorandum 16 – 03 in which he instructed Regional Offices to argue that an employer violates section 8 (a) (5) of the Act if it withdraws recognition absent the results of a Board election.

Presumably, the Administrative Law Judge will base his decision on existing Board law and not on the apparent views of the General Counsel. To the extent, however, that the Administrative Law Judge will reconsider Board law, it is respectfully suggested that the Celanese standard which had worked well for 50 years should be re-adopted rather than the new approach suggested by the General Counsel. It would be particularly inappropriate for the Administrative Law Judge to apply the General Counsel's suggested approach in this case. It would be unfair enough if a new standard were applied to find an unfair labor practice to conduct which had occurred before such standard were adopted. It would be completely outrageous and a violation of due process for a new standard to be adopted after the close of a hearing where this new standard had not been advanced.

With respect to the issue of the possible retroactive application of a new standard, Respondent recognizes that the "Board's usual practice is to apply new policies and standards 'to all present cases in whatever stage.' " The Board noted however that under "Securities & Exchange Commission v. Cheney Corp., 332 U.S. 194, 203 (1947), the propriety of retroactive application is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.' " Deklewa, *supra* at 1389 (citing Deluxe Metal Furniture Co., 121 NLRB 995, 1006-1007 (1958).

In Epilepsy Foundation v. NLRB, 268 F.3d 1095 (D.C. Cir. 2001) the Court held that the Board erred in applying a new rule retroactively since it contravened notions of equity and fairness. In reaching this conclusion the Court applied the following balancing test:

> "In considering whether to give retroactive application to a new rule, "the governing principle is that when there is a 'substitution of new las for old law that was reasonably clear', the new rule may justifiably be given prospectively-only affect in order to 'protect the settled expectations of those who has relied on the preexisting rule.' By contrast, retroactive effect is appropriate for "new applications of [existing] law, clarifications, and additions." *Id.* at 1102

Respondent submits that the principles of equity and fairness preclude any retroactive application of any new rule.

E. Under the Levitz Standard, Respondent's Withdrawal of Recognition from the Union was Lawful

For the reasons set forth in Section C above, the remainder of this argument will be based on the belief that the Administrative Law Judge will decide this case based upon Levitz and its progeny. As discussed above, under Levitz, an employer's doubt or uncertainty about the Union's majority status is no longer enough to justify a withdrawal of recognition; the employer must prove that the union "has, in fact, lost majority support." Id. At 723. To apply this standard "the Board anticipated a burden-shifting scheme, explaining that once an employer presents objective evidence demonstrating the union's loss of majority status, the General Counsel may rebut the evidence in order to shift the burden back to the employer ultimately to make its showing by a preponderance of the evidence. If the General Counsel presents nothing in rebuttal, however, the employer will ordinarily prevail." NLRB v. Mullican Lumber and Manufacturing Company, 535 F.3d 271, 277 (4th Cir. 2008) citing Levitz. Id. At 725 n.49. The Mullican court then went on to discuss the nature of objective evidence and noted that:

> 'Objective' evidence does not refer to the 'force' of the evidence, but rather its 'source.' See Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 367-68 n. 2, 118 S. Ct. 818, 139 L. Ed. 2d 797 91998). As the Supreme Court explained, '[r]equiring the employer's doubt to be based on 'objective' considerations reinforces the requirement 'that the doubt be reasonable' imposing on the employer the burden of showing that it was supported by evidence external to the employer's own (subjective) impressions.' *Id*. at 368 n. 2 (emphasis added). While the reasonable-doubt standard referred to in Allentown Mack has now been overruled by Levitz, the definition of 'objective' has not. *Ibid.*

Respondent submits that this analysis can lead to only one result – the union had in fact lost majority status when respondent withdrew recognition from it in 2015 and Respondent's conduct therefore is not a violation of the Act. General Counsel did not establish whether the withdrawal of recognition occurred before or after April 28, 2015, the last date on which Joseph DeLozier was employed by Respondent. Assuming for the sake of argument that he was employed at the time of the withdrawal recognition, the stipulated facts establish that there were two bargaining unit employees, DeLozier and Michael Bittner. Michael Bittner's testimony clearly and unequivocally establishes that throughout his employment with Loshaw he was never a supporter of the union and only rejoined the union so that he could work for the company owned by his sisters-in-law.

Many of the post Levitz cases have necessarily involved parsing the statements or writings of employees to see if they were merely unhappy with the Union's performance or the obligation to pay dues as contracted with a desire to be free from union representation. See, for example, Pacific Coast Supply, LLC 360 NLRB No. 67 (2014) where the Administrative Law Judge and the Board carefully analyzed written statements received from four employees and concluded that they no longer wanted to be members of the union. Clearly, in this case, both the long term actions and frequent statements of Michael Bittner constituted the requisite objective

evidence that he would like to have nothing to do with the union. He has left it voluntarily ten years before, rejoined for the sole purpose of being able to work with his family and regularly expressed his desire that he did not want to be involved with the union (pp. 23-32).

General Counsel may try to argue that Bittner's lack of support for the union is somehow tainted by actions taken by Respondent, including the discussion that took place at the office when Bittner was informed that the company was leaving the union. Contrary to any possible claims by the General Counsel, there is not a hint of any intimidation or coercion that resulted in Michael Bittner's decision to continue working for Loshaw at that time. To the contrary, his actions are entirely consistent with his statements and conduct throughout his employment with Loshaw. This is not a case where an individual employee is called into a meeting with the owners of the company and other supervisors pressured into renouncing his support for the Union. It was, as Michel Bittner testified just the usual gathering when he went to pick up his paycheck. It must be remembered that he was meeting with members of his family, and his desire throughout this process, above all else, was to work with his family.

Indeed, his testimony the day of the hearing made it clear that his feelings as of April 25, 2016 regarding the Union were the same as those that he had when he began working for Loshaw in 2012. There is no evidence that his decision to resign from the union, which was communicated to his brothers and his sisters-in-law, was the result of any intimidation or coercion. These facts clearly establish that if the union ever had majority status, they no longer had it in 2015 when Respondent withdrew recognition. The General Counsel did not present any testimony to rebut this evidence. Accordingly, the complaint should be dismissed.

F. Potential Remedial Issues

In the unlikely event that the Administrative Law Judge finds that Respondents withdrawal of recognition was unlawful, there are several unique factors that should impact any remedial relief which would be recommended. First of all, since the departure of DeLozier in April 2015, the only persons performing bargaining unit work have been Michael Bittner and Adam Geesey. Geesey is the son of Marcy Bittner and for the reasons discussed in Section A above, he also would not qualify as an "employee" under the act. Therefore, for at least the past year, there has been a one person bargaining unit and it would be inappropriate for the Administrative Law Judge to require Respondent to bargain with the union for such a unit.

As the Board held in Foreign Car Center, 129 NLRB 319 91960), since it will not certify a one-person unit because the concept of collective bargaining necessarily involves more than one eligible person who desires to bargain, it also follows that the Board cannot direct an employer to bargain with respect to such unit. *Id* at 320. In Stack Electric, 290 NLRB 575 91988) the Board made it clear that this principle applied to 8(f) as well as 9(a) relationships.

Related to this issue is the alleged violation of the company to adhere to the terms of the 2012 – 2015 contract including the failure to follow the contract's hiring and referral procedures. It will be recalled, however, that Michael Bittner testified without contradiction that Loshaw was instructed by former Union Business Manager Stanton Bair that it could hire whoever wanted to. There is no testimony whatsoever that such permission was ever withdrawn by the union. Accordingly, at least with respect to this contract provision, the union agreed to waive this requirement as it pertains to Loshaw.

V. CONCLUSION

For all of the reasons set forth above, it is respectfully suggested that the bargaining relationship between Loshaw and the Union began as an 8(f) relationship and was never legally converted to anything other than an 8(f) relationship. Accordingly, Loshaw was free to walk away from its bargaining relationship upon the expiration of the most recent contract on June 28, 2015. Even if the relationship was converted at some point to a 9(a) relationship, the evidence established that the Union had, in fact, lost any majority status it may have ever employed as of April 2015. Therefore, Loshaw's withdrawal of recognition was not a violation of the Act and the Complaint should be dismissed.

Respectfully submitted,

HARMON & DAVIES, P.C.

Dated: June 7, 2016

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Respondent's Brief to the Administrative Law Judge this 7th day of June, 2016, with true and correct copies being sent via first class mail to the following:

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